



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 119 OF 2013**

**(Before Hon. Justice Hellen S. Wasilwa on 30<sup>th</sup> July, 2014)**

**CHRIS ELAMOKA ..... CLAIMANT**

**-VERSUS-**

**CORN PRODUCTS LTD ..... RESPONDENTS**

**JUDGMENT**

The claimant herein Chris Elamoka filed his statement of claim through the firm of Angu Kitigin and Co. Advocates on the 7th of May 2013. It is the claimant's case that he was employed by the respondents Company as a procurement manager for 18 years with his salary raising to Ksh 202,000/= per month. He was based at respondents Eldoret factory. Sometimes in 2012, the respondents Company changed hands and the new management after assuming all liabilities and assets, resolved to wind up the factory operations at Eldoret. This decision was not communicated to management staff to which claimant belonged nor was it passed on to junior staff.

The claimant states that due to this decision made to close the Eldoret plant, the respondents commenced on an exercise to lay off staff for any trivial reason. He fell victim and was summoned at 2 pm and told to attend a meeting at 4 pm with operations manager. At the meeting, he was shown a letter dated 13.6.2012 (*Appl 1*). It was a show cause letter and the same had laid down complaints against him where he repeatedly failed to follow procedures and complete duties which led to the company shutting down for lack of essential materials. Vide this letter he was invited to a disciplinary hearing on 18.6.2012 at 11.30 am at their Nairobi office where he was expected to make any representations if any in the case in question. The letter also sent him on compulsory leave pending the conclusion of the process. He was not able to get any documents to defend himself e.g LPOS which were in the computer system and hard copies and he was not allowed to access his office. He proceeded to attend the hearing scheduled in Nairobi for 11 am and he could not access the LPOS he was referring to. The hearing proceeded without his evidence being considered. The respondents found him culpable on 6 grounds which was not true and had not been discussed in his notice to show cause meeting. After the meeting, he was given a termination letter immediately and was not paid his dues for the 18 years he had served the company. The Eldoret plant closed 1 month after his termination and he attributes his termination to a deliberate move to deny him his dues. He was terminated on 22.7.2012.

In cross-examination, the claimant admitted that he was not declared redundant and was not paid any dues. He admits that he was a member of NSSF. He was paid dues set out in his termination letter. He says that he didn't reply to the notice to show cause as there was no time to reply and he had no documents to refer to. He said he had had previous warnings on the plant supplies with shortage of bags and he brought in alternative bags which Nzioki refused to use. On LPOs missing, his evidence is that he never made any order without LPOs and he could not access the LPOs because they were in the office

computer. He stated that a warning lasts for 1 year and so they could not rely on a warning that had been issued earlier than a year back.

The respondents filed their memo of reply through the firm of Hamilton Harrison & Mathews on 28.6.2013. It is their case that, the claimant was their employee until termination of his services on 18.6.2012.

It is also their case that the respondents provided a market for a substantial percentage of the maize produced in the Rift Valley and other parts of the country. However, owing to influx of cheap imports, they encountered decrease performance in July 2012 and they decided to cease production operation and shut down their plant in Eldoret. They informed the employees of this situation on 23.7.2012 and also issued a notice to declare the employees redundant and also informed the union and the labour officer at Eldoret.

The claimant on the other hand was terminated in June 2012 before the redundancy exercise was carried out in August 2012 and this was due to his poor performance whereby he failed to adhere to procurement procedures. It is respondents case that they suffered a shortage of essential materials due to claimants breach and disregard to procedures. The claimant was given a notice to show cause and then subjected to a disciplinary hearing. He was thereafter terminated after his representations were considered.

It is therefore the respondents position that claimant's termination was warranted and he was paid out Ksh 364,799.60 as his terminal benefits. Further it is respondents position that claimant is not entitled to payment of gratuity as he was an NSSF contributor and this is in tandem with S. 35(6)(d) of the Employment Act 2007.

After considering the evidence and submissions of the parties, the issues for consideration by the court are as follows:-

1. **Whether the claimant's termination by respondents was effected after due process.**
2. **Whether the claimant is entitled to prayers sought.**

On 1st issue the claimant was served with a letter to show cause on 13.6.2012. In the same letter he was asked to attend to a disciplinary hearing in Nairobi on 18.6.2012. It is apparent that the letter of 13.6.2012 explained to the claimant reasons why the respondent was considering terminating his services. This was in compliance with provisions of S. 43 and 45 of Employment Act 2007 which provides that reasons for termination must be given.

The reasons given are that the claimant was not following procedures a brief of which is given. The claimant was further informed of a disciplinary meeting scheduled for 18.6.2012 at 11.30 am in Nairobi where he was expected to attend. The meeting did take place as scheduled. The claimant contends that though this meeting took place, he was not given adequate time to prepare himself and he could not get documents to support his case as he was sent on leave on 13.6.2012 and forbidden from accessing company premises and property. During the hearing, he also talked of the LPOs he was to use to prove his case which he stated that were in his computer at the office. These too could bit be accessed. S. 41 of Employment Act provides that:-

**“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”**

In compliance with this provision, the claimant was accorded a hearing but the hearing contemplated should be fair and just as contemplated under Article 50(2) of the Constitution:-

**“To have adequate time and facilities to prepare a defence.”**

If it is true that the claimant did not have access to some documents in answer to accusations levelled against him, then he was not given a fair hearing.

The claimant stated that he was given his termination letter 15 minutes after the disciplinary hearing, to suggest that the termination was predetermined even before the hearing. To prove this predetermination, the Eldoret plant shut down a month after his termination. It is claimant's assertion that he was terminated so that the respondent could avoid paying him his redundancy dues which he now prays for.

It is the finding of this court that due process was followed before claimant was terminated and he was duly paid his terminal dues. But he was not given adequate time to defend himself. There is however no proof that he was being victimized to avoid redundancy payments as the chronology of his non performance was clearly brought out in the documents presented before this court. He had previously been warned of the same and this is what culminated in the hearing and finally the dismissal. Due to the fact that he had no access to the office and was barred from accessing it to get the documents he wished to rely on, it cannot be said that the termination was fair.

Is the claimant then entitled to prayers he has sought. It is apparent that he was indeed paid 2 months salary in lieu of notice and other allowances on a *prorata* basis. In view of the claimant agreeing to terminate his services and paying him, they were treating the termination as a normal termination and I find it as such.

It is proved that he was a member of the NSSF and a contributor thereof and was not entitled to payment of service pay. He wants this court to order him paid severance pay and to have his termination treated as redundancy. By the time he was terminated no redundancies has been declared and this court cannot treat him as having been declared redundant when there is no proof of the same.

I therefore find that the claimant is not entitled to payment of severance pay as prayed but given the length of period he served respondents for 18 years and in treating his termination as a normal termination, it was fair and just that he be paid terminal benefits. I therefore find for him and order that respondents pay him 6 months salary as terminal benefits;

= 202,000 X 6 = **Ksh 1,212,000/=** subject to tax deductions. He should also be issued with a certificate of service. Respondents to pay costs of this suit.

**HELLEN S. WASILWA**

**JUDGE**

**30/7/201**

**Appearances:-**

Onyango for respondent applicants

Respondents present

N/A for claimant

CC. Wamache